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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 383

GENERAL BOX COMPANY,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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Attorneys for Petitioner

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To the Honorable, the Supreme Court of the United States:

Comes now, General Box Company, petitioner in the above entitled and numbered cause, and presents this petition for a rehearing of the above entitled cause and in support thereof, respectfully shows:

1.

This Honorable Court has held that petitioner's property was effectively appropriated by State authorities and that, therefore, the United States as the donee of the property could destroy petitioner's property without compensation. This Court was of the opinion that the Louisiana Courts had made no pronouncements which controlled the issues here presented and made its own determination on the question of local law involved. This Court concluded that under the law of Louisiana "The State as owner of the servitude legally could have destroyed the timber without prior notice and without any opportunity for mitigation of losses, and yet be free of liability to petitioner."

2.

Petitioner now shows that this pronouncement as to the law of Louisiana is erroneous and that the Louisiana Supreme Court has in many cases clearly and unequivocally enunciated the legal principles applicable to the issues here presented. Under the decisions of that Court the servitude for constructing and enlarging levees is limited by the reasonableness of its use and when oppression and injustice is shown the property owner is not without a remedy and the Court will review the action of the State authorities. *Dubose v. Levee Commissioners*, 7 La. Ann. 165; *Peart v. Meeker*, 45 La. Ann. 421, 12 So. 490; *Egan v. Hart*, 45 La. Ann. 1358; *Pruyn v. Nelson Bros.*, 180 La. 760, 157 So. 585.

3.

Petitioner concedes that the Louisiana Courts have never established an inflexible rule that notice must be given in all

cases prior to the exercise of the servitude for the reason that where there is imminent danger of a flooding condition it would be reasonable and proper not to give such notice.

4.

Petitioner further shows that the issue of notice raised in the present case is only one of the issues of fact to be taken into account in determining whether or not the action of the State authorities has been unreasonable and whether or not oppression or injustice has been shown.

5.

In the instant case the trial Judge, Judge Dawkins, reached a conclusion of fact that the action of the Levee Board was unreasonable and that "oppression" and "injustice" had been shown. In reaching this conclusion Judge Dawkins, who is the only member of the Louisiana Bar who has participated as a judge in this case, was suffering from no misconception as to the applicable Louisiana law. One of the facts taken into account by the trial court was that under the circumstances of this particular case it would have been reasonable and proper to give notice. In reaching this conclusion the trial court did not hold, and it was not necessary for him to hold, that under Louisiana law notice is always required before State authorities can act. The District Court in reaching its conclusion, therefore, correctly applied the applicable law of the State of Louisiana to the facts and circumstances of this case, and this Court and the Court of Appeals has reversed the decision of the trial court on a question of fact where no manifest error has been shown, and contrary to the principle that a trial court will not be reversed on an issue

of fact unless the findings of fact are clearly erroneous. Rule 52, F.R.C.P.

6.

Petitioner respectfully shows that a rehearing should be granted herein for the reason that this Honorable Court has erred in the judgment rendered herein and that this error was caused by failure to properly apply the local law applicable to the case, and by a failure to apply the principle that findings of fact of a trial court will not be reversed unless clearly erroneous.

7.

Petitioner further shows that this Honorable Court has apparently reserved its decision on whether the due process clause of the Fifth Amendment has been violated. As to this the Court said:

> ". . . Petitioner did not assert in its complaints or in its question presented on petition for certiorari that the destruction violated the Due Process Clause of the Fifth Amendment."

8.

Petitioner respectfully shows that one theory of its case has always been that it was not accorded due process under the Fifth Amendment, and that for this reason petitioner was entitled to just compensation under that same amendment. This issue was developed in the original complaint, in the opin-

ions below, and in the petition for certiorari and in the brief before this Court.

9.

In the original complaint filed herein the following allegation was made:

> "That the destruction of said timber was the taking of said timber, the property of the plaintiff, within the meaning of the Fifth Amendment to the Federal Constitution; and plaintiff as owner is entitled to compensation for the full and true value thereof." (R. 25, R. 51).

10.

Justice Cameron in the dissenting opinion in the Court of Appeals discussed this issue thoroughly, and petitioner quoted extensively from his opinion in the petition for certiorari, and in the brief filed before this Court.

11.

Petitioner therefore respectfully urges as an additional ground for granting a rehearing herein that this Court should make a determination as to whether or not the due process clause of the Fifth Amendment has been violated.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the United States Court of Appeals for the Fifth Circuit be upon further consideration reversed, and that judgment be rendered in favor of petitioner awarding

petitioner damages as fixed by the District Court, and allowing interest at the legal rate from the date of taking until paid.

Respectfully submitted,

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CARL C. CHADWICK
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Attorneys for Petitioner

By _____
Edward Donald Moseley

CERTIFICATE

I, counsel for the above named General Box Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith, and not merely for the purposes of delay, and a copy thereof has been mailed to Simon E. Sobeloff, Solicitor General, Department of Justice, Washington 25, D. C., Perry W. Morton, Assistant Attorney General, Lands Division, Department of Justice, Washington 25, D. C., T. Fitzhugh Wilson, United States Attorney, Shreveport, Louisiana, and Roger P. Marquis and S. Billingsley Hill, Attorneys, Department of Justice, Washington, D. C., by first class mail, postage prepaid, this 18th day of May, 1956.

Edward Donald Moseley